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APPELLANT PRO SE:

CHARLES E. DEMORROW
Elkhart, Indiana

ATTORNEYS FOR APPELLEE:

REBECCA BUTLER POWER
NORMAN L. BURGGRAF, JR.
Butler Power Burggraf, P.C.
Elkhart, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

CHARLES E. DEMORROW,

Appellant,

vs.

EUNICE L. DEMORROW,

Appellee.

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No. 20A04-0612-CV-714

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable David C. Bonfiglio, Judge
Cause No. 20D06-0510-DR-749

June 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Charles DeMorrow (Husband), appeals the trial court's Order denying Husband's request to modify the property settlement agreement he entered into with Appellee-Respondent, Eunice L. DeMorrow (Wife).

We affirm.

ISSUES

Husband appears to raise three issues on appeal which we restate as follows:

- (1) Whether the trial court abused its discretion by refusing to modify the provisions in the property settlement agreement that can be construed to constitute maintenance payments;
- (2) Whether the trial court abused its discretion by refusing to modify the property settlement agreement in order to reach a fair and equal division of the marital assets; and
- (3) Whether Husband can assert fraud allegations based on a document first mentioned after he filed his Notice of Appeal.

FACTS AND PROCEDURAL HISTORY

Husband and Wife were married on March 17, 1963 and separated on October 3, 2005. On October 18, 2005, Wife filed her Petition for Dissolution of Marriage. Later that month, on October 27, 2005, while at Wife's counsel's office, Husband reviewed and signed a stipulation for provisional orders, a property settlement agreement, and a decree of dissolution of marriage. On December 20, 2005, the trial court approved the decree of dissolution, the parties' property settlement agreement, and waiver of final hearing.

On July 21, 2006, Husband filed a Minute Sheet requesting a modification of the divorce decree, which was denied by the trial court as the filing was not in compliance with Indiana's Trial Rules. On August 8, 2006, Husband filed his second request for modification. Thereafter, on August 28, 2007, Wife filed her Motion to Dismiss Husband's motion for modification based on his failure to state a claim pursuant to Ind. Trial Rule 12(B)(6). On October 3, 2006, the trial court conducted a hearing on the parties' respective motions. Upon hearing arguments, the trial court denied Husband's motion to modify the property settlement agreement. Consequently, on October 30, 2006, Husband filed his Notice of Appeal. On December 15, 2006, the trial court clerk notified this court that the Clerk's Record was completed.

On November 9, 2006, Wife filed a Verified Showing of Non-Compliance requesting that Husband be held in contempt for his non-compliance with certain terms of the property settlement agreement. That same month, on November 21, 2006, the trial court held a hearing on Wife's motion, finding Husband in contempt. During the compliance hearing on January 2, 2007, Husband presented a letter purportedly written on October 25, 2005 and delivered to Wife's counsel in which he expressed his disagreement with the property settlement agreement. When the trial court refused to accept this letter, Husband attached it to his "Motion to Discovery," filed with the trial court on January 5, 2007.

Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Maintenance Payments

First, Husband argues that his property settlement agreement should be revised as it improperly includes alimony payments. Specifically, as Husband appears to characterize the allocation of his VA/DAV benefits to Wife as alimony, he asserts that the trial court abused its discretion to award these payments to Wife because no showing was made that Wife could not “keep gainful employment because of physical or mental disability.” (Appellant’s Br. p. 6).

Our review of the proceedings shows that Husband never presented his maintenance argument to the trial court. In fact, he raises this claim for the first time on appeal. Generally, a party may not raise an issue on appeal that was not raised before the trial court. *McGill v. Long*, 801 N.E.2d 678, 687 (Ind. Ct. App. 2004), *reh’g denied, trans. denied*. Accordingly, Husband has waived this first issue for our review.

II. Modification of Property Settlement Agreement

Next, Husband encourages this court to set aside the property settlement agreement, approved by the trial court and incorporated into the divorce decree, as it does not represent an equitable division of the marital assets. The public policy of this state favors separation agreements. *Rothschild v. Devos*, 757 N.E.2d 219, 223 (Ind. Ct. App. 2001). A property settlement that is incorporated into a final divorce decree is a binding contract, and the dissolution court may not modify that settlement absent fraud, duress, or undue influence. *Adler v. Adler*, 713 N.E.2d 348, 354 (Ind. Ct. App. 1999).

During the hearing on Husband's request for modification, Husband clarified to the court that because he was drinking heavily and was on high doses of Zoloft, he was not thinking clearly when signing the property settlement agreement. However, Husband never disputed signing the documents, nor did he claim any fraud, duress, or undue influence during the execution of the agreement. A mere change of mind in the manner the marital property is divided is not a proper ground to modify the property settlement agreement. *See id.* Accordingly, we affirm the trial court's decision.

III. *Admission of New Document*

In his final argument, Husband attempts to construct a fraud claim based on a letter he submitted to the trial court on January 5, 2007. This letter, purportedly sent to Wife's counsel on October 28, 2005, a day after Husband signed the property settlement agreement, states in pertinent part, "I do not agree with the settlement in my divorce and I want to have it rewritten." (Appellant's App. p. 32).

Nevertheless, Husband filed his appeal against the trial court's denial of his request to modify on October 30, 2006. Accordingly, Husband's letter was not before the trial court when it considered his claim to modify the property settlement agreement. As we cannot consider evidence for the first time on appeal, Husband's claim is not available for our review. *See Saler v. Irick*, 800 N.E.2d 960, 972 (Ind. Ct. App. 2003).

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion by refusing to modify the property settlement agreement, incorporated in the decree of dissolution of marriage.

Affirmed.

NAJAM, J., and BARNES, J., concur.